No.

In the
Supreme Court of the United States

JOSEPH STEELE,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Second Circuit, in contrast to every other federal circuit except for the Court of Appeals for the Fourth Circuit, erroneously determined that the statutory definition of a "violent felony," as provided under the "elements clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), encompasses crimes that do not require as an element the intentional, knowing, or reckless use, attempted use, or threatened use of violent force.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Steele respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's "summary order" affirming Steele's conviction and sentence, *United States v. Steele*, --- Fed. App'x ----, 2018 WL 1612238 (2d Cir. April 4, 2018), is included in the Appendix at Pet. App. A.1. The Second Circuit's order denying Steele's motion for a panel rehearing, pursuant to Rule 40, Fed. R. App. P., is included in the Appendix at Pet. App. B.1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Second Circuit affirmed the judgment of the district court on April 4, 2018 and denied Steele's timely petition for panel rehearing on April 24, 2018. This petition was filed within 90 days of the latter event.

STATUTORY PROVISIONS INVOLVED

Armed Career Criminal Act - 18 U.S.C. § 924(e)

> **(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be . . . imprisoned not less than fifteen years[.]
>
> **(2)** As used in this subsection--
>
> > **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . that--
> >
> > > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > >
> > > **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

New York Penal Law § 160.15: Robbery in the First Degree

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or immediate flight therefrom, he or another participant in the crime:
>
> > **1.** Causes serious physical injury to any person who is not a participant in the crime; or
> >
> > **2.** Is armed with a deadly weapon; or
> >
> > **3.** Uses or threatens the immediate use of a dangerous instrument; or
> >
> > **4.** Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm[.]

STATEMENT OF THE CASE

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), provides that a defendant who is convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and who has sustained "three previous convictions by any court . . . for a violent felony or a serious drug offense, or both," is subject to a 15-year mandatory minimum period of imprisonment. A defendant who is determined to be an "armed career criminal" is also subject to significant offense level and criminal history category enhancements under § 4B1.4(b) and (c) of the U.S. Sentencing Guidelines. This case presents an opportunity for this Court to resolve a conflict among the federal courts of appeals as to whether a "violent felony," as defined by the ACCA "elements clause," § 924(e)(2)(B)(i), requires as an element the intentional, knowing, or reckless use, attempted use, or threatened use of violent force.

I. The Unsettled Definition of a "Violent Felony" Under the ACCA Elements Clause

In *Johnson v. United States*, 559 U.S. 133, 140 (2010) (hereinafter "*Johnson 2010*"), this Court analyzed the ACCA elements clause, which provides that a predicate "violent felony" must require "as an element the use, attempted use, or threatened use of physical force upon the person of another," and held that "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." Previously, in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), this Court determined that the "use" of physical force in the context of 18 U.S.C. § 16(a), which contains statutory language that is substantially similar to

the ACCA elements clause, "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Thus, the elements clause definition of a violent felony requires both: (1) the use, attempted use, or threatened use of *violent* force; and (2) an intent threshold higher than negligence. However, there is a disagreement among the federal courts of appeals as to whether a prior conviction must specifically require proof of a defendant's intentional, knowing, or reckless violent conduct, or whether the *Johnson 2010* violent force and *Leocal mens rea* requirements may be established separately.

II. The Procedural History of This Case

A. District Court Proceedings

After a three-day jury trial before the United States District Court for the Southern District of New York, Petitioner Joseph Steele was found guilty of one count of being a felon in possession of a firearm, in violation of § 922(g)(1). Pet. App. C.1. During his sentencing proceeding, the district court determined, over Steele's objection, that Steele had sustained three prior ACCA-eligible convictions, including a 1998 conviction for robbery in the first degree under New York Penal Law ("P.L.") § 160.15(4). Pet. App. D.2-6; E.1-2. The district court therefore determined that Steele qualified as an "armed career criminal," and Steele was sentenced to the minimum term of 15 years' imprisonment required under § 924(e)(1). Pet. App. C.2; D.5.

B. Proceedings Before the Court of Appeals

The Court of Appeals for the Second Circuit had jurisdiction over this case pursuant to 28 U.S.C. § 1291. In his briefs on appeal, Steele argued that his prior New York robbery conviction did not qualify as a violent felony under the ACCA elements clause, as the district court had found, because P.L. § 160.15(4) does not require as an element the intentional use, attempted use, or threatened use of violent force. Rather, Steele noted that P.L. § 160.15 requires proof that a defendant intended only to commit a "forcible steal[ing]," an element which the New York courts have interpreted as requiring far less force than is required for ACCA violent felonies under *Johnson 2010*. Moreover, the aggravating factor provided under subsection (4) of P.L. § 160.15 may be established where "another participant in the crime . . . displays what appears to be a [firearm]," regardless of whether the defendant participates in that conduct, intends for that conduct to occur, or is even aware that it has occurred or will occur. Thus, under the "modified categorical approach," *Descamps v. United States*, 570 U.S. 254, 257 (2013), the minimum conduct prohibited by P.L. § 160.15(4) is: (1) an intent to engage in non-violent criminal activity; and (2) a threat of violent force issued by another participant in the crime without the defendant's involvement, intent, or knowledge. Steele argued that this was insufficient to satisfy the § 924(e)(2)(B)(i) definition of a violent felony under *Johnson 2010* and *Leocal*, and that the ACCA's sentencing provisions, which were intended for offenders who have repeatedly and intentionally engaged in violent conduct, should not have been applied to him.

Before oral arguments were held in connection with Steele's appeal, the Second Circuit issued its decision in *Stuckey v. United States*, 878 F.3d 62, 70-71 (2d Cir. 2017), *petition for cert. filed*, No. 17-9369 (June 14, 2018), wherein the court held that subsections (3) and (4) of P.L. § 160.15 both categorically qualify as predicate violent felonies under the ACCA elements clause. 878 F.3d 62. The *Stuckey* panel recognized that a prior conviction must require a *mens rea* higher than negligent or accidental conduct in order to qualify as an ACCA violent felony under *Leocal*, and that the strict liability aggravating factors listed under subsections (1) through (4) of the New York statute may be established where a co-participant uses or threatens the use of violent force without the defendant's participation, intent, or knowledge. *Id.*, at 67-68. However, the Second Circuit determined that "the intent and force requirements outlined in *Leocal* and *Johnson 2010* are examined separately," and that the ACCA elements clause "requires only a threshold intent to engage in criminal conduct." *Id.*, at 70. Therefore, because the New York courts have established that a P.L. § 160.15 conviction requires proof of a defendant's "'intent . . . to permanently deprive the victim of property,'" *id.*, at 70 (quoting *People v. Miller*, 661 N.E.2d 1358, 87 N.Y.2d 211, 217 (1995)), and because the strict liability aggravating factors provided under subsections (3) and (4) of P.L. § 160.15 separately require the use or threatened use of violent force by *some* participant in the crime, the *Stuckey* court held that those subsections categorically qualify as violent felonies under the ACCA elements clause. *Id.*, at 72.

The *Stuckey* decision was binding on the Second Circuit panel that heard Steele's appeal, and district court's determination that Steele qualified as an armed career criminal was therefore affirmed. Pet. App. A.2-3. On April 24, 2018, the Second Circuit denied Steele's petition for a panel rehearing, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Pet. App. B.1.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The Second Circuit's interpretation of the ACCA elements clause, as set forth in *Stuckey* and as applied in this case, is substantially similar to the interpretation that was recently adopted by the Fourth Circuit in *United States v. Smith*, 882 F.3d 460 (4th Cir. 2018), but is in direct conflict with the established law in every other federal circuit. *Infra*, Part I(B). Therefore, until the question presented in this petition is resolved, federal criminal defendants who are convicted of § 922(g) offenses and who have previously been convicted of crimes that do not require intentional, knowing, or reckless violent conduct may be subjected to the ACCA's sentencing provisions, or not, depending on the circuit in which they are convicted and sentenced.

Insofar as unresolved issues about federal sentencing provisions are concerned, the question presented in this petition is of particular importance. The determination that a defendant qualifies as an armed career criminal has dramatic consequences with respect to the range of prison sentences that a district court is authorized to impose, and these consequences should be reserved for defendants

who have repeatedly and intentionally engaged in violent conduct, as Congress intended.

In addition, the varying legal interpretations of ACCA elements clause affect similarly worded statutes and Guidelines provisions relating to, among other things, immigration removal determinations, mandatory minimum prison sentences for firearms-related offenses, "career offender" designations, and other "crime of violence"-related sentencing enhancements. *See* 18 U.S.C. §§ 16(a), 924(c)(3)(A); U.S.S.G. §§ 2K2.1, 2L1.2, 4B1.1. Therefore, because a resolution of the question presented in this petition as it applies to the ACCA elements clause will also bring uniformity to federal court decisions relating to these other statutes and Guidelines provisions, this Court's intervention is warranted to resolve the existing conflict among the federal courts of appeals.

I. This Court Should Resolve the Unsettled Question of Whether a "Violent Felony," as Defined by the ACCA Elements Clause, Requires the Intentional, Knowing, or Reckless Use, Attempted Use, or Threatened Use of Violent Force.

This case presents an ideal opportunity for this Court to resolve the question presented. The only disputed issue relating to the sentence that was imposed by the district court is whether Steele's prior conviction for robbery in the first degree under P.L. § 160.15(4) qualifies as a violent felony under the ACCA elements clause. *See* Pet. App. D.2-6. In addition, because robbery is not one of the generic felonies listed under 18 U.S.C. § 924(e)(2)(B)(ii), and because this Court has overturned the "residual clause" of that section on constitutional grounds, *Johnson v. United States*, --- U.S. ----, 135 S.Ct. 2551 (2015) (hereinafter "*Johnson 2015*"), Steele's New York

robbery conviction can *only* qualify as an ACCA predicate if it meets the requirements of the § 924(e)(2)(B)(i) elements clause. Finally, because P.L. § 160.15(4) separately requires proof of: (1) a defendant's intent to participate in criminal conduct, and (2) the threatened use of violent force by *some* participant in the crime, Steele's status as an armed career criminal necessarily depends on whether the ACCA elements clause specifically requires culpable violent conduct, or whether the *Leocal mens rea* and *Johnson 2010* violent force requirements may be established separately.

A. Steele's Prior Robbery Conviction Under P.L. § 160.15(4) Does Not Require Proof of Intentional, Knowing, or Reckless Violent Conduct.

New York's first-degree robbery statute, P.L. § 160.15, provides, in relevant part, that:

> A person is guilty of robbery in the first degree when he forcibly steals property and when . . . he or another participant in the crime:
>
> (3) Uses or threatens the immediate use of a dangerous instrument; or
>
> (4) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. . . .

Under the "modified categorical approach," *see Descamps*, 570 U.S. at 257; *Mathis v. United States*, --- U.S. ----, 136 S.Ct. 2243, 2249 (2016), Steele's prior conviction under P.L. § 160.15(4) necessarily required proof of two separate elements: (1) the intentional forcible stealing of property; and (2) the display of what appears to be a firearm by the defendant or by another participant in the

crime.[1] The first of these elements does not require the application of "*violent* force," *Johnson 2010*, 559 U.S. at 140, and the second does not require a defendant to personally commit, intend, or even know about violent conduct that may be committed by a co-participant in the crime.

1. First element: "forcible stealing" requires intent but not violent force.

The first element that must be proven with respect to any P.L. § 160.15 crime is the forcible stealing of property. This element is defined under New York's general robbery statute, P.L. § 160.00, which provides that "[r]obbery is forcible stealing," and that "[a] person forcibly steals property and commits a robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of" effecting the larceny. The New York courts have determined that this element requires a defendant's specific intent to deprive a victim of property, *People v. Smith*, 591 N.E. 2d 1132, 79 N.Y.2d 309 (1992); *Miller*, 661 N.E.2d 1358, and it therefore comports with the *Leocal* standard of a *mens rea* higher than negligent or accidental conduct. 543 U.S. at 9.

[1] The Second Circuit has determined that the aggravating factors provided under P.L. § 160.15 (1) through (4) are alternative "elements" that define four separate crimes, and that the statute is therefore "divisible" and subject to "modified categorical review" for the purpose of determining whether it qualifies as an ACCA violent felony. *See United States v. Jones*, 878 F.3d 10, 16-17 (2d Cir. 2017); *Stuckey*, 878 F.3d at 67. While Steele was bound by this determination before the court of appeals, he did not concede that P.L. § 160.15 is in fact "divisible." Rather, because a P.L. § 160.15 conviction requires proof that a defendant committed only one criminal element—the intentional forcible stealing of property—Steele contends that the statute is *not* divisible and that the traditional categorical approach should have been applied. *See generally United States v. Rivers*, 595 F.3d 558, 564 (4th Cir. 2010) (holding that "a statute which imposes strict liability for certain conduct does not describe 'several different kinds of behavior' such that it would constitute a 'separate crime' for purposes of applying the modified categorical approach.") (quoting *Chambers v. United States*, 555 U.S. 122, 126-27 (2009), *abrogated on other grounds*, *Johnson 2015*, 135 S.Ct. 2551).

However, the New York appellate courts have repeatedly confirmed that the "use of physical force" required under § 160.00 may be satisfied by the application of slight, *de minimus* force, a standard that falls well short of the "*violent* force" required for ACCA violent felonies under *Johnson 2010*, 559 U.S. at 140.[2] For example, in *People v. Smith*, 5 N.E.3d 584, 22 N.Y.3d 1092 (2014), the New York Court of Appeals held that a "forcible stealing" was established where two defendants impersonated police officers, ordered a victim to place his hands on a wall, and then frisked him and removed items from his pockets. *See also People v. Bennett*, 219 A.D.2d 570, 631 N.Y.S.2d 834 (App. Div. 1st Dept. 1995) ("[defendant] and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away."); *People v. Safon*, 166 A.D.2d 892, 560 N.Y.S.2d 552 (App. Div. 4th Dept. 1990) ("Proof that the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove the that defendant used physical force for the purpose of overcoming the victim's resistance to the taking."); *People v. Patton*, 184 A.D.2d 483, 585 N.Y.S.2d 431 (App. Div. 1st Dept. 1992) ("By

[2] The New York State courts' interpretations of New York's criminal laws and their elements are binding on this Court. *See Johnson 2010*, 559 U.S. at 138 (citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997)). Moreover, while this Court has granted *certiorari* in the case of *Stokeling v. United States*, 684 Fed. Appx. 870 (11th Cir. 2017), *cert. granted*, 86 U.S.L.W. 3495 (U.S. April 2, 2018) (No. 17-5554), which presents the question of whether a Florida robbery statute requiring proof of the overcoming of "victim resistance" meets the *Johnson 2010* violent force standard despite state appellate court decisions to the contrary, the resolution of that question in the affirmative would not alter the fact that New York's "forcible stealing" element, P.L. § 160.00, does not require the use of violent force.

blocking the victim's passage, defendant aided in codefendant's retention of the property, and thereby participated in the robbery.").

Therefore, the forcible stealing element of P.L. § 160.15, as defined under P.L. § 160.00 and as interpreted by the New York appellate courts, does not necessarily entail the use, attempted use, or threatened use of "*violent* force," as required for ACCA predicates under the elements clause. *Johnson 2010*, 559 U.S. at 140 (emphasis in the original).

2. Second element: the subsection (4) aggravating factor requires a threat of violent force but no personal participation, intent, or knowledge.

The second element required to establish a P.L. § 160.15(4) violation is the display of "what appears to be a [firearm]" by the defendant "or [by] another participant in the crime[.]" While this element satisfies the *Johnson 2010* violent force standard, it does not require proof that a defendant personally participated in the threatened use of violent force, intended for it occur, or was even aware that it had occurred or would occur.

In *Miller*, 661 N.E.2d 1358, the New York Court of Appeals specifically noted that the aggravating factors provided under subsections (1) through (4) of P.L. § 160.15 are "strict liability" factors that do not require proof of *any* degree of intent attributable to the defendant. Rather, the *Miller* court explained that "[t]he culpable mental state" required for all New York robbery crimes is "the intent to permanently deprive the owner of . . . property," and that "[w]hether the robber commits a first, second[,] or third degree robbery offense, the requisite intent

remains the same. . . . [I]t is the presence of statutorily designated aggravating factors which elevates the severity of the crime from a robbery in the third degree to a robbery in the second or first degree." *Id.*, at 217. *See also People v. Fingall*, 136 A.D.3d 622, 24 N.Y.S.3d 704 (App. Div. 2d Dept. 2016) (holding that "proof of the 'culpable mental state' of an accomplice[] does not apply to the aggravating circumstances of robbery in the first degree."); *In re Angel V.*, 247 A.D.2d 343, 669 N.Y.S.2d 211 (App. Div. 1st Dept. 1998) ("The presentment agency was not required to prove that appellant intended or knew that the accomplice would threaten the immediate use of a dangerous instrument.").

Therefore, because a P.L. § 160.15(4) crime may be established where another participant in the crime displays what appears to be a firearm without the defendant's participation, intent, or knowledge, this strict liability aggravating factor plainly does not satisfy the *Leocal* requirement of "a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9.

B. There is a Conflict Among the Federal Courts of Appeals as to Whether the ACCA Elements Clause Requires a Culpable *Mens Rea* With Respect to the Application of Violent Force.

In *Stuckey*, the Second Circuit assumed that the petitioner's prior P.L. § 160.15(3) and (4) convictions did not require proof of a specific intent to engage in violent conduct. 878 F.3d at 67-68. Indeed, the *Stuckey* court noted that, under the modified categorical approach, "we must assume that Stuckey himself did not commit or intend to commit the aggravated conduct that elevated the offenses to first degree robbery." *Id.*, at 67. But the Second Circuit nevertheless held that P.L.

§ 160.15(3) and (4) qualified as violent felonies because "the intent and force requirements outlined in *Leocal* and *Johnson 2010* are examined separately," and therefore "the ACCA requires only a threshold intent to engage in criminal conduct." *Id.*, at 70. Under this interpretation of the elements clause, which the Second Circuit has since applied to a Connecticut robbery statute in *United States v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018), the ACCA definition of a "violent felony" encompasses crimes that do not require proof of a defendant's intentional, knowing, or reckless (or even negligent) violent conduct.

The Court of Appeals for the Fourth Circuit has recently adopted an interpretation of the ACCA elements clause that is substantially similar to the Second Circuit's *Stuckey* rule. *Smith*, 882 F.3d 460. However, every other federal circuit has determined that the ACCA elements clause and analogous statutory and Guidelines provisions require a culpable *mens rea* standard—such as "intentional," "knowing," or "reckless"—that specifically applies to the use, attempted use, or threatened use of violent force.

1. The Fourth Circuit, like the Second Circuit, has held that ACCA violent felonies do not require culpable violent conduct.

Following this Court's decision in *Leocal*, the Fourth Circuit affirmed that the "'[u]se' of force," as defined by the ACCA elements clause, requires "a mens rea more culpable than negligence or recklessness." *United States v. Townsend*, 886 F.3d 441, 444-45 (4th Cir. 2018). However, in *United States v. Smith*, 882 F.3d 460, 463-64 (4th Cir. 2018), the court determined that a defendant's North Carolina voluntary manslaughter conviction qualified as an ACCA violent felony despite "the possibility

of conviction based on using an unreasonable amount of force while acting in self-defense." The *Smith* court explained that although the voluntary manslaughter law does not require the intentional use of violent force, it nevertheless satisfies the ACCA elements clause requirements because "[e]ven if a defendant acted only negligently in choosing the *amount* of force to use in such a case, the underlying decision to *use* force was still an intentional one." *Id.*, at 464 (emphasis in the original).

The Fourth Circuit's interpretation of the ACCA elements clause, as set forth in *Smith*, echoes the Second Circuit's *Stuckey* rule: Both courts have determined that the elements clause does not require a heightened *mens rea* standard that specifically applies to the use, attempted use, or threatened use of violent force. However, there *may* be a slight (albeit important) distinction between the respective rules adopted by the Second and Fourth Circuits. Specifically, the Fourth Circuit's uncoupling of the elements clause's *mens rea* and violent force requirements may be limited to cases where a defendant applied violent force "only negligently," or with some higher degree of intent. 882 F.3d at 464. Unlike the Second Circuit's opinion in *Stuckey*, 878 F.3d at 67-68, the Fourth Circuit did not expressly hold that the elements clause may also encompass crimes that do not require *any* degree of personal participation, intent, or knowledge relating to the use, attempted use, or threatened use of violent force. But the precise scope of the *Smith* decision has not yet been litigated or determined, and it is therefore unclear at present whether

there is any substantive distinction between the Fourth Circuit's interpretation of the ACCA elements clause and the Second Circuit's *Stuckey* rule.

2. The Third, Seventh, and Ninth Circuits specifically require "intentional" or "knowing" violent conduct.

In contrast to the rules adopted by the Second and Fourth Circuits, the Courts of Appeals for the Third, Seventh, and Ninth Circuits have held that the ACCA elements clause and analogous statutory and Guidelines provisions require the "intentional" or "knowing" use of violent force. For example, in *United States v. Dixon*, the Ninth Circuit held that the crime of robbery under California Penal Code ("C.P.C.") § 211 did not qualify as an ACCA violent felony in part because the California Supreme Court had previously held that C.P.C. § 211 offenses may be established where a defendant *accidentally* uses force. 805 F.3d 1193, 1197 (9th Cir. 2015) (citing *People v. Anderson*, 252 P.3d 968, 125 Cal. Rptr. 3d 408 (2011)). The *Dixon* court explained that, under prior Ninth Circuit precedent, the ACCA "element test" requires the use of violent force, and that this "use of force must be intentional, not just reckless or negligent." *Id.* (citing *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010)). *See also United States v. Walton*, 881 F.3d 768, 775 (9th Cir. 2018).

In addition, the Courts of Appeals for the Third and Seventh Circuits have held that the "use" of violent force, as defined under the ACCA elements clause and analogous elements clauses, must be "intentional" or "knowing." In *United States v. Chapman*, the Third Circuit specifically held that "[t]he word 'use' means 'the intentional employment of . . . force, generally to obtain some end,'" and that the

elements clause of the U.S.S.G. § 4B1.2(a) "crime of violence" definition therefore requires "the intentional employment of something capable of causing physical pain or injury to another person[.]" 866 F.3d 129, 132-33 (3d Cir. 2017) (quoting *Tran v. Gonzalez*, 414 F.3d 464, 470 (3d Cir. 2005)). *See also United States v. Lewis*, 720 Fed. App'x 111, 114 (3d Cir. 2018) (holding that "the use of physical force" required under the ACCA elements clause "must be knowing or intentional; reckless or gross negligence are insufficient.").[3] Along similar lines, the Seventh Circuit has recently held that "[t]o be a crime of violence," as defined by the U.S.S.G. § 4B1.2(a)(1) elements clause, "the offense must have as an element the intentional or knowing use, attempted use, or threatened use of physical force against the person of another." *United States v. Teague*, 884 F.3d 726, 728 (7th Cir. 2018).

3. The First and Eleventh Circuits have held that a mens rea *standard higher than "recklessness" is required with respect to the "use" of violent force.*

Like the Third, Seventh, and Ninth Circuits, the Courts of Appeals for the First and Eleventh Circuits have held that the ACCA elements clause and analogous statutory and Guidelines provisions require a heightened *mens rea* requirement with respect to the use, attempted use, or threatened use of violent force. Although neither court has specifically held that an "intentional" or "knowing" scienter is required, the First and Eleventh Circuits have both

[3] In an unpublished decision, *United States v. Nieves-Galarza*, 718 Fed. App'x 159 (3d Cir. 2017), the Third Circuit held that New York's P.L. § 160.15(4) qualifies as an ACCA violent felony under the elements clause without addressing the fact that the "display of what appears to be [a firearm]" element may be established without the defendant's participation, intent, or knowledge. Therefore, *Nieves-Galarza* was wrongly decided under existing Third Circuit precedent.

determined that the "use" of force requires something more than "reckless" violent force. For example, in *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (per curiam), the First Circuit analyzed a Massachusetts assault and battery with a dangerous weapon ("ABDW") statute, Mass. Gen. Laws ch. 265, § 15B(b), which prohibits, among other things, the intentional commission of a wanton or reckless act, but "does *not* require that the defendant intend to cause injury . . . or even be aware of the risk of serious injury that any reasonable person would perceive[.]" *Id.*, at 37-38 (citations omitted) (emphasis added). Because of the "grievous ambiguity as to whether the use of physical force" required under § 924(e)(2)(B)(i) "includes the reckless causation of bodily injury," the *Windley* court determined that the rule of lenity supported the conclusion that the reckless version of the ABDW statute is not an ACCA violent felony. *Id.*, at 38-39. *See also United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018).

The Eleventh Circuit has likewise held that "a conviction predicated on a *mens rea* of recklessness does not satisfy the 'use of physical force' requirement under [U.S.S.G.] § 2L1.2's definition of 'crime of violence.'" *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). Thus, in *United States v. Flores-Velasquez*, 651 Fed. App'x 861, 869 (11th Cir. 2016), the Eleventh Circuit held that a defendant's prior New York first-degree assault conviction under P.L. § 120.10(3), which requires reckless conduct that "creates a grave risk of death to another person," does not qualify as a "crime of violence" under § 2L1.2.

4. The Fifth, Sixth, Eighth, and Tenth Circuits, along with the D.C. Circuit, have held that "reckless" violent conduct is sufficient.

In *Voisine v. United States*, --- U.S. ----. 136 S.Ct. 2272, 2280 (2016), this Court held that a misdemeanor conviction for reckless assault under Maine law qualifies as a misdemeanor crime of domestic violence ("MCDV") under 18 U.S.C. § 921(a)(33)(A), and that "[a] person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally."[4] The *Voisine* opinion also clarified that reckless conduct involves "a deliberate decision to endanger another," and that the word "use," as it applies to the statutory MCDV definition, is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." *Id.*, at 2279.

In recent years, the Courts of Appeals for the Fifth, Sixth, Eighth, and Tenth Circuits, and the District of Colombia Circuit, have applied the reasoning of *Voisine* to the ACCA elements clause and to analogous statutory and Guidelines provisions. For example, in *United States v. Howell*, 838 F.3d 489, 501-02 (5th Cir. 2016), the Fifth Circuit determined that, under *Voisine*, a conviction for assault under Texas Penal Code Ann. § 22.01(a)(1), which may be established through the use of reckless violent force, was categorically a "crime of violence" under U.S.S.G. § 4B1.2(a). *See also United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017); *United States v. Burris*, 892 F.3d 801, 807 (5th Cir. 2018).

[4] Section 921(a)(33)(A) provides, in relevant part, that a MCDV is a misdemeanor that "has, as an element, the use or attempted use of physical force . . ."

The Sixth Circuit, for its part, has determined that there are "two types of *mens rea*" required by the ACCA elements clause under *Voisine*. *Higdon v. United States*, 882 F.3d 605, 607 (6th Cir. 2018). First, the "conduct giving rise to the force" must be "'volitional' rather than accidental." *Id.* (citing *Voisine*, 136 S.Ct. at 2278-79). Second, "the defendant must be at least reckless as to the consequences of that conduct." *Id. See also United States v. Verwiebe*, 874 F.3d 258, 264 (6th Cir. 2017) (holding that "the argument that crimes satisfied by reckless conduct categorically do not include the 'use of physical force' simply does not hold water after *Voisine*.").

The Eighth, Tenth, and D.C. Circuits have likewise applied *Voisine* to their interpretations of the ACCA elements clause and similar provisions. *See United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (holding that a statute criminalizing the reckless discharge of a firearm qualifies as an ACCA violent felony); *United States v. Ramey*, 880 F.3d 447, 448-49 (8th Cir. 2018) (holding that, "consistent with *Voisine* and *Fogg*," the U.S.S.G. § 4B1.2 "crime of violence" definition encompasses "reckless conduct causing injury to another by use of a firearm[.]"), *petition for cert. filed*, No. 17-8846 (May 9, 2018); *United States v. Deiter*, 890 F.3d 1203, 1213 (10th Cir. 2018) (holding that "'[a] statute requiring proof only that the defendant acted willfully and with reckless regard for the risk posed by that act to another person may categorically involve the use of physical force' under the ACCA.") (quoting *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017)); *United States v. Haight*, 892 F.3d 1271, 1280-81 (D.C. Cir. 2018)

(holding that a *mens rea* of recklessness is sufficient to constitute the "use" of force, but "accidental or involuntary" conduct is not) (citing *Voisine*, 136 S.Ct. at 2279).

In determining that reckless violent conduct is sufficient to meet the *mens rea* and violent force requirements of the ACCA elements clause and similar statutory and Guidelines provisions, the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits have adopted rules that conflict with the First, Third, Seventh, Ninth, and Eleventh Circuit decisions discussed above. *Supra,* Part I(B)(2)-(3). However, *all* of these courts of appeals are in agreement that the ACCA elements clause and similar provisions require *some* degree of culpable violent conduct. Thus, the established law in every one of these circuits is in direct conflict with the Second Circuit's *Stuckey* rule, 878 F.3d 62, and with the Fourth Circuit's decision in *Smith*, 882 F.3d 460.

II. Conflicting Interpretations of § 924(e)(2)(B)(i) Elements Clause Affect Critical ACCA Sentencing Determinations and Also Affect the Scope of Other Important Criminal Statutes and Sentencing Provisions.

A. The Definition of a "Violent Felony" Has Dramatic Consequences With Respect to the Range of Criminal Sentences That May Be Imposed.

The various interpretations of the ACCA elements clause have real and substantial consequences for federal criminal defendants and for the federal judicial system. A defendant who is convicted of a § 922(g) crime and is determined to be an "armed career criminal" is subject to a mandatory minimum period of 15 years' imprisonment, § 924(e)(1), and is also subject to offense-level and criminal history category enhancements under U.S.S.G. § 4B1.4(b) and (c). On the other hand, a

convicted § 922(g) defendant who is *not* found to be an armed career criminal is subject to a statutory *maximum* of 10 years' imprisonment, with no applicable mandatory minimum, 18 U.S.C. § 924(a)(2), and is not subject to the U.S.S.G. § 4B1.4 enhancements. Thus, because of the existing conflict among the federal circuit courts regarding the scope of the ACCA elements clause, defendants whose "armed career criminal" designation depends on whether one or more of their prior criminal convictions qualifies as a violent felony, despite the lack of an element requiring culpable violent conduct, will be subjected to vastly different statutory sentencing ranges depending on the federal circuit in which their sentencing takes place.

This is by no means an academic issue. Conflicting interpretations of the ACCA elements clause are likely to affect dozens, if not hundreds of criminal sentencing cases each year. According to the U.S. Sentencing Commission, 276 federal defendants were found to be "armed career criminals" during fiscal year 2017. U.S. Sentencing Commission, *2017 Sourcebook of Federal Sentencing Statistics*, Table 20, at S-47 (22d ed. 2017) (hereinafter "*2017 Sourcebook*"), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf (last visited July 19, 2018). Over that same period of time, ACCA determinations formed the basis for 7.1 percent of all federal sentencing reversals or remands. *Id.*, at Table 57, S-147. Moreover, because this Court determined in *Johnson 2015* that the ACCA's "residual clause" is unconstitutionally vague, 135 S.Ct. 2551, and because there are

only a few enumerated generic violent felonies provided under § 924(e)(2)(B)(ii), it is likely that a large percentage—if not an overwhelming majority—of future ACCA decisions, reversals, and remands will involve issues relating to the application of the § 924(e)(2)(B)(i) elements clause.

B. The Law Governing the Definition of the ACCA Elements Clause Affects Other Statutes and Guidelines Provisions.

Because the caselaw relating to the ACCA elements clause is often applied to other statutory and Guidelines provisions that contain the same or substantially similar language, the effects of the existing conflict among the federal circuit courts described above, *supra* Part I(B), are not limited to cases involving ACCA-related issues.

For example, this Court has noted that the statutory "crime of violence" definition under 18 U.S.C. § 16(a), which affects immigration removal determinations under the Immigration and Nationality Act, is "very similar" to the ACCA elements clause, *Johnson 2010*, 559 U.S. at 140, and the courts of appeals have interpreted the two statutes in parallel.[5] *See, e.g., Stuckey*, 878 F.3d at 68-69; *Palomino Garcia*, 606 F.3d at 1327-1336. In addition, the *Johnson 2010* violent force and *Leocal mens rea* requirements are frequently applied to interpretations of the 18 U.S.C. § 924(c) minimum mandatory sentencing provisions for certain

[5] 18 U.S.C. § 16(a) defines a "crime of violence' as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

firearms-related crimes.[6] *See United States v. Evans*, 848 F.3d 242, 245 (4th Cir. 2017); *United States v. Rafidi*, 829 F.3d 437, 445-46 (6th Cir. 2016). *See also Douglas v. United States*, 858 F.3d 1069, 1072 (7th Cir. 2017) (describing § 16(a), § 924(c)(3)(A), and the ACCA elements clause as "the trio of elements clauses in Title 18," and noting that they each require "a knowing or intentional act that causes bodily harm.").

Finally, the U.S. Sentencing Guidelines provisions governing "career offender" designations under § 4B1.1(a), offense-level enhancements for certain firearms offenses under § 2K2.1(a), and enhancements for certain immigration offenses under § 2L1.2 are all affected by appellate decisions regarding the scope of the ACCA elements clause.[7] *See, e.g.*, *United States v. Williams*, 893 F.3d 696, 700 (10th Cir. 2018) (noting that "we have drawn on our ACCA case law when interpreting the guideline term "crime of violence."); *United States v. Pate*, 719 Fed. App'x 302, 303 (4th Cir. 2018) (applying the Fourth Circuit's prior holding in *Smith*,

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[6] 18 U.S.C. § 924(c)(1)(A) provides a graduated series of mandatory minimum sentences of imprisonment for the use, brandishing, or discharge of a firearm in connection with a "crime of violence" or drug trafficking crime. Section 924(c)(3)(A), in turn, defines a "crime of violence" as "an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[7] The U.S.S.G. § 4B1.1 "career offender" enhancements apply where a defendant has, among other things, sustained "at least two prior felony convictions of either a crime of violence or a controlled substance offense." The term "crime of violence," for "career offender" purposes, is then defined under U.S.S.G. § 4B1.2(a)(1) as any felony that "has as an element the use, attempted use, or threatened use of physical force upon the person of another[.]" This same definition is applied to the "crime of violence" enhancements for firearms-related crimes under § 2K2.1, as per Application Note 1 to that section, and also to the § 2L1.2(2)(E) and (3)(E) enhancements for unlawful entry crimes, as per Application Note 2 to that section.

882 F.3d 460, to the U.S.S.G. § 4B1.2(a) "crime of violence" definition); *United States v. Dixon*, 874 F.3d 678, 680 (11th Cir. 2017) ("In determining whether a conviction is a 'crime of violence' under [U.S.S.G. § 2K2.1] . . . we rely on cases interpreting the definition of 'violent felony' under the [ACCA] because the definitions are substantially the same."); *United States v. Rede-Mendez*, 680 F.3d 552, 555 n.2 (6th Cir. 2012) ("To the extent that cases interpreting [18 U.S.C. §§ 16 and 924(e)(2)(B)] analyze the 'element' prong, they are probative to an interpretation of U.S.S.G. § 2L1.2.").

While the effects of these Guidelines provisions may not always be as drastic as the ACCA's sentencing provisions—in that they do not require a mandatory minimum sentence of imprisonment that is five years higher than the maximum penalty that would otherwise be available, § 924(a)(2), (e)(1)—they are nevertheless significant. For example, the U.S.S.G. § 4B1.1 "career offender" provisions often provide for substantial offense level and criminal history category enhancements that have the combined effect of increasing advisory sentencing ranges by considerable margins. Indeed, the U.S. Sentencing Commission has found that the average federal criminal defendant who was determined to be a "career offender" in Fiscal Year 2014, but who would have otherwise been placed in criminal history category II or III if not for his or her "career offender" designation, received an "average guideline minimum" sentence increase of 84 months. U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements*, at 21 (Aug. 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/news/

congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (last visited July 19, 2018). Moreover, like the ACCA, questions about the Guidelines' "career offender" provisions have arisen in a substantial number of recent federal sentencing cases: In Fiscal Year 2017, 1,593 defendants were found to be career offenders, and 4.7 percent of all federal sentencing reversals or remands involved issues regarding the application of the U.S.S.G. §§ 4B1.1, and 4B1.2 career offender provisions. *2017 Sourcebook*, at Table 20, S-47, and Table 57, S-147.

III. The Second and Fourth Circuits Have Interpreted the ACCA Elements Clause in a Manner That Contradicts This Court's Precedents and Undermines the ACCA's Basic Purposes.

The Second and Fourth Circuit interpretations of the ACCA elements clause, as set forth in *Stuckey*, 878 F.3d 62, and *Smith*, 882 F.3d 460, respectively, are contrary to this Court's binding decision in *Leocal*, 543 U.S. 1, and are not in keeping with the ACCA's fundamental purpose of providing enhanced punishments for criminal offenders who repeatedly engage in purposeful violent conduct. Therefore, this Court's intervention is warranted to correct the Second and Fourth Circuits' errors and to promote uniformity in the federal courts' interpretations of the ACCA elements clause and the analogous statutory and Guidelines provisions described above. *Supra*, Part II(B).

A. The Second and Fourth Circuits' Uncoupling of the *Mens Rea* and Violent Force Requirements Contradicts This Court's Analysis in *Leocal*.

In *Leocal*, this Court noted that "[t]he critical aspect" of the § 16(a) "crime of violence" definition "is that a crime of violence is one involving the 'use . . . of

physical force *against the person or property of another*,'" and that the term "'use' requires active employment." *Id.*, at 9 (emphasis added in *Leocal*). As a result, the Court concluded that "[t]he key phrase in § 16(a)—the 'use . . . of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* (citations omitted). This *mens rea* standard is therefore clearly tied to the statutory "'use' . . . of physical force" requirement under the § 16(a) elements clause, and not to some broader "use" of criminal conduct that also happens to involve the intended or unintended application of physical force by the defendant or by another participant in the crime. The Second and Fourth Circuits' determinations to the contrary simply do not correspond with the most natural reading of *Leocal*, and they are not supported by any subsequent decisions from this Court.

B. The ACCA's Sentencing Provisions Were Intended for Defendants Who Have Repeatedly Engaged in Intentional Violent Conduct.

The plain language of the ACCA does not reveal any provisions relating to the principle of accomplice liability.[8] Therefore, it is worth questioning whether the purpose of the statute is advanced when prior convictions that do not require

[8] In *Stuckey*, the Second Circuit noted that "certain federal offenses . . . embody [the] principle" that "a defendant may be held responsible for actions taken by an accomplice to certain crimes." 878 F.3d at 70 (citing *Pinkerton v. United States*, 328 U.S. 640 (1946), and *United States v. Parkes*, 497 F.3d 220, 232 (2d Cir. 2007)). But there is no indication that this principle is in any way applicable to the ACCA. Indeed, the Second Circuit did not provide any reasoning or analysis that would support the extension of accomplice liability to the ACCA elements clause. Moreover, the cases to which the *Stuckey* court cited in explaining the accomplice liability principle's relevance in *other* contexts are highly distinguishable because they involved questions relating to the federal conspiracy statute, which by its very nature contemplates "a partnership in crime." *Pinkerton*, 328 U.S. at 644.

intentional, knowing, or reckless violent conduct are defined as "violent felonies" under the § 924(e)(2)(B)(i) elements clause.

In *Begay v. United States*, 553 U.S. 137, 144-45 (2008), *abrogated on other grounds, Johnson 2015*, 135 S.Ct. 2251, this Court held that a New Mexico DUI law could not be considered a "violent felony" under the ACCA's subsequently-overturned "residual clause," § 924(e)(2)(B)(ii), because, unlike the enumerated crimes listed under that subsection, it did not "involve purposeful, 'violent,' and 'aggressive' conduct." The Court explained that this limitation of the residual clause was appropriate because purposeful, violent, and aggressive conduct "is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Id.*, at 145. In addition, the Court noted that "[c]rimes committed in such a purposeful, violent, and aggressive manner are potentially more dangerous when firearms are involved . . . [a]nd such crimes are characteristic of the armed career criminal, the eponym of the statute." *Id.* (internal quotations omitted).

Finally, this Court's *Begay* opinion explained the relevance of the distinction between "purposeful, violent, and aggressive" crimes and "strict liability" offenses, which criminalize conduct "to which the offender need not have had any criminal intent at all." *Id.*

> When viewed in terms of the [ACCA's] basic purposes, this distinction matters considerably. As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. . . . In order to determine which offenders fall into this category, the Act looks to past crimes.

> In this respect—namely, a prior crime's relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary or arson) are different from DUI, a strict-liability crime. In both instances, the offender's prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.

Id., at 146 (internal citations omitted).

The fact that *Begay* was specifically addressed to the ACCA's now-invalidated residual clause under § 924(e)(2)(B)(ii), rather than to the § 924(e)(2)(B)(i) elements clause, does not in any way undermine or refute this Court's analysis of the broader statute's "basic purpose[]" as it applies to the distinction between "purposeful, violent, and aggressive" crimes and strict liability offenses. *Id.*, at 145-46. *See also Descamps*, 570 U.S. at 293 (Alito, J., dissenting) (noting that Congress enacted the ACCA, in part, to ensure "that violent, dangerous recidivists would be subject to enhanced penalties[.]"). Indeed, it is still true that prior convictions requiring proof of "purposeful, violent, and aggressive" conduct indicate a higher likelihood that "an offender, later possessing a gun, will use that gun deliberately," and that such crimes "are potentially more dangerous when firearms are involved." *Begay*, 553 U.S. at 145. Thus, the "basic purpose[]" of the ACCA is advanced when its sentencing provisions are applied to offenders who have sustained prior convictions requiring "purposeful, violent, and aggressive" conduct, *id.*, at 145-46, but *not* to those who were previously convicted of crimes, like P.L. § 160.15, that include "strict liability" aggravating factors involving violent conduct that may be

committed by "another participant in the crime" without the defendant's participation, intent, or knowledge.

Unfortunately, the Second and Fourth Circuits have dispensed with the distinction between crimes that involve culpable violent conduct and those that have separate *mens rea* and violent force requirements, at least insofar as the ACCA's "violent felony" definition is concerned. *Stuckey*, 878 F.3d at 70; *Smith*, 882 F.3d at 463-64. In so doing, they have not only contradicted every other federal circuit and violated this Court's binding opinion in *Leocal*, but they have also undermined the very purpose of the ACCA.

CONCLUSION

Therefore, the instant petition for a writ of *certiorari* should be granted.

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